

1 The Honorable Marsha J. Pechman
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 CYRIL SABBAGH, individually and on behalf
11 of all others similarly situated,

12 Plaintiff,

13 v.

14 CELL THERAPEUTICS, INC., DR. JAMES A.
15 BIANCO M.D. and DR. JACK W. SINGER
16 M.D.,

17 Defendants.

Case No. 10-cv-414-MJP

CLASS ACTION

MOUSTAFA F. MOUKARIM'S MOTION
FOR CONSOLIDATION, APPOINTMENT
AS LEAD PLAINTIFF AND APPROVAL
OF HIS SELECTION OF LEAD AND
LIAISON COUNSEL

NOTE ON MOTION CALENDAR:
May 28, 2010

ORAL ARGUMENT REQUESTED

19 MICHAEL LAQUIDARI, Individually And On
20 Behalf Of All Others Similarly Situated,

21 Plaintiffs,

22 v.

23 CELL THERAPEUTICS, INC., JAMES A.
24 BIANCO M.D. and JACK W. SINGER M.D.,

25 Defendants.

Case No. 10-cv-480-MJP

26
MOTION FOR CONSOLIDATION
AND TO APPOINT LEAD PLAINTIFF
(CASE NO. 10-CV-414-MJP)
1896745.1

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1 WILLIAM SNYDER, Individually and On
2 Behalf Of All Others Similarly Situated,

3 Plaintiff,

4 v.

5 CELL THERAPEUTICS, INC., JAMES A.
6 BIANCO, PHILLIP M. NUDELMAN, LOUIS
7 A. BIANCO, JOHN H. BAUER, RICHARD L.
8 LOVE, MARY O. MUNDINGER, JACK W.
9 SINGER, FREDERICK W. TELLING and
10 RODMAN & RENSHAW, LLC,

11 Defendants.

12 Case No. 10-cv-559-MJP

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1 Moustafa F. Moukarim (“Mr. Moukarim”) respectfully moves this Court pursuant to the
 2 Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. §78u-4(a)(3)(B) and 15
 3 U.S.C. §77z-1(a)(3)(B),¹ for an Order: (1) consolidating for all purposes the above-captioned
 4 actions (the “Related Actions”) pursuant to Fed. R. Civ. P. 42; (2) appointing Mr. Moukarim as
 5 lead plaintiff; (3) approving Mr. Moukarim’s selection of Barroway Topaz Kessler Meltzer &
 6 Check, LLP (“Barroway Topaz”) as lead counsel and Keller Rohrback L.L.P (“Keller
 7 Rohrback”) as liaison counsel; and (4) granting such other relief as the Court may deem just and
 8 proper. *See In re Oppenheimer Rochester Funds Group Sec. Litig.*, 2009 U.S. Dist. LEXIS
 9 113555 (D. Colo. 2009). This Motion is made on the grounds that Mr. Moukarim is the “most
 10 adequate plaintiff.” *See* 15 U.S.C. § 78u-4(a)(3)(B). In support of this Motion, Mr. Moukarim
 11 submits herewith the declaration of Juli E. Farris.

12 **I. INTRODUCTION**

13 The Related Actions are brought on behalf of all persons who purchased the securities of
 14 Cell Therapeutics, Inc. (“Cell Therapeutics” or the “Company”) between May 5, 2009 and
 15 March 19, 2010, inclusive (the “Class Period”).² The putative class also includes all person who
 16 purchased or otherwise acquired Cell Therapeutics securities pursuant to or traceable to the
 17 Company’s public offering completed on or about July 23, 2009. The Related Actions allege
 18 violations of §§ 10(b) and 20(a) of the Exchange Act and §§ 11, 12(a)(2) and 15 of the Securities
 19 Act. Pursuant to the PSLRA, the Related Actions should be consolidated because they involve
 20 common issues of law and fact. *See* Fed. R. Civ. P. 42(a). In addition, Mr. Moukarim should be

21
 22 ¹ The lead plaintiff provisions of the Securities Act of 1933 (the “Securities Act”) and
 23 Securities Exchange Act of 1934 (the “Exchange Act”), as amended by the PSLRA, are
 24 identical. *See* 15 U.S.C. §77z-1; 15 U.S.C. §78u-4. To avoid duplicative citation, only the lead
 25 plaintiff provisions of the Exchange Act are cited herein.

26 ² For purposes of this Motion, Mr. Moukarim uses the longest, most comprehensive class
 27 period asserted in the Related Actions to calculate his financial interest. *See Miller v. Dyadic
 28 Int’l, Inc.*, 2008 U.S. Dist. LEXIS 32271, at *11 (S.D. Fla. 2008).

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1 selected as lead plaintiff because, to the best of his knowledge, he has the largest financial
 2 interest in the relief sought by the class.³ *See In re Cavanaugh*, 306 F.3d 726, 729-30 (9th Cir.
 3 2002); *Doral Bank P.R. v. WaMu Asset Acceptance Corp.*, 2010 U.S. Dist. LEXIS 37909, at *5
 4 (W.D. Wash. 2010). In addition, Mr. Moukarim satisfies the requirements of Rule 23 of the
 5 Federal Rules of Civil Procedure (“Rule 23”) because his claims are typical and he will fairly
 6 and adequately represent the class’ interests. *See id.* Finally, in accordance with the PSLRA,
 7 Mr. Moukarim’s selection of lead and liaison counsel should be approved. *See* 15 U.S.C. §78u-
 8 4(a)(3)(B)(v).

9 **II. FACTUAL BACKGROUND**

10 Cell Therapeutics is a biopharmaceutical company focused on developing and
 11 commercializing novel agents that seek to improve the safety and efficacy of the existing
 12 standard-of-care for chemotherapy. The Company is incorporated under the laws of the state of
 13 Washington and maintains its principal office in Seattle. Throughout the Class Period the
 14 Company repeatedly made false and misleading statements about the progress of a Phase III
 15 clinical study of a drug the Company was developing called “pixantrone” for the treatment of
 16 Non-Hodgkin’s Lymphoma (“NHL”), as well as other cancers.⁴ The study, called PIX-301, was
 17 initiated in July of 2007 in the hopes of obtaining regulatory approval of pixantrone from the
 18 U.S. Food and Drug Administration (“FDA”).

19 Pixantrone was purportedly being studied pursuant to a special protocol assessment
 20 (“SPA”) with the FDA. An SPA is a declaration from the FDA that an uncompleted Phase III
 21 trial’s design, clinical endpoints, and statistical analyses are acceptable for FDA approval. SPAs

22
 23 ³ *See Declaration of Juli E. Farris in Support of Moustafa F. Moukarim’s Motion for*
 24 *Consolidation, Appointment as Lead Plaintiff and Approval of His Selection of Lead and Liaison*
 25 *Counsel (“Farris Decl.”), Exhibits (“Exs.”) A-C.*

26
 27 ⁴ Phase III trials are “[e]xpanded controlled and uncontrolled trials after preliminary
 28 evidence suggesting effectiveness of the drug has been obtained, and are intended to gather
 29 additional information to evaluate the overall benefit-risk relationship of the drug....”
<http://clinicaltrials.gov/ct2/info/glossary>, accessed May 10, 2010.

1 are very important to investors because they serve as a pre-approval for a drug trial by
 2 eliminating a major uncertainty with the approval process for drugs. Namely, the SPA process
 3 reduces the chance that a drug could meet the requirements of a drug study and still be denied
 4 approval by the FDA.

5 As detailed in the complaint, Cell Therapeutics touted its involvement in the SPA process
 6 in its communications to investors. For example, in mid-2009 the Company issued a press
 7 release declaring that “[t]he pixantrone study received Special Protocol Assessment approval
 8 from the FDA in 2004, and pixantrone has received fast track designation for this indication.”
 9 Similar statements were issued throughout the Class Period. Cell Therapeutics’ statements not
 10 only artificially inflated the value of the Company’s stock price but they also allowed defendants
 11 to sell over 33.7 million shares of common stock (and over 8.4 million warrants to purchase
 12 additional shares of common stock) at a price of \$1.30 per share, for gross proceeds of
 13 approximately \$43.9 million in a public offering in July 2009.

14 However, contrary to the Company’s representations, pixantrone was removed from the
 15 SPA process after the PIX-301 study prematurely terminated enrollment in March 2008. The
 16 truth about the Company’s inability to rely on the SPA process was not disclosed to investors,
 17 only emerging nearly two years later on February 8, 2010, when the FDA posted an analysis on
 18 its website (the “FDA Report”) stating: “On March 28, 2008, [Cell Therapeutics] notified the
 19 FDA of an early halt to enrollment for PIX301. The study was not stopped at a planned interim
 20 analysis and ***early study stopping invalidated the applicant’s Special Protocol Assessment.***”
 21 (Emphasis added). The FDA Report establishes that the Company’s Class Period statements
 22 regarding pixantrone’s ability to be approved via an SPA are misleading. One market
 23 commentator responded to the FDA report by questioning, ***[h]ow is Cell Therapeutics going to***
explain why it lied about having an SPA for the pixantrone study? Cell Therapeutics has also
 25 been accused of conducting the study without enrolling a suitable patient population (patients
 26 with aggressive NHL) thereby manipulating the true efficacy of pixantrone.

1 The release of the FDA Report led to an immediate decline in the value of Cell
 2 Therapeutics' common stock. The Company's shares fell from a closing price of \$1.06 per share
 3 (as of February 5, 2010) to close at \$0.64 per share (as of February 8, 2010), a decline of nearly
 4 40%. Subsequently, on March 22, 2010, the FDA panel voted unanimously that Cell
 5 Therapeutics' clinical trial data was not adequate to support the approval of pixantrone. In
 6 response, Cell Therapeutics' stock fell 48% from its closing price \$0.91 per share (as of March
 7 19, 2010) to close at \$0.47 per share (as of March 22, 2010).

8 **III. ARGUMENT**

9 **A. The Related Actions Should be Consolidated**

10 Between March 12, 2010 and March 31, 2010, three securities class action lawsuits were
 11 filed against Cell Therapeutics:

Abbreviated Case Name	Case No.	Date Filed
<i>Sabbagh v. Cell Therapeutics, Inc., et. al.</i>	10-cv-414-MJP	03/12/10
<i>Laquidari v. Cell Therapeutics, Inc., et. al.</i>	10-cv-480-MJP	03/19/10
<i>Snyder v. Cell Therapeutics, Inc., et. al.</i>	10-cv-559- MJP	03/31/10

12 Consolidation is appropriate when, as here, all of the Related Actions involve common
 13 questions of law or fact. *See Schonfield v. Dendreon Corp.*, 2007 U.S. Dist. LEXIS 76816, at *4
 14 (W.D. Wash. 2007) (citing Fed. R. Civ. P. 42(a)); *Pinkowitz v. Elan Corp., PLC*, 2002 U.S. Dist.
 15 LEXIS 14593, at *18-*19 (S.D.N.Y. 2002) (finding consolidation of actions alleging Exchange
 16 Act claims with an action alleging Securities Act claims to be proper due to common questions
 17 of law and fact). Here, because all of the Related Actions assert similar and overlapping claims
 18 arising out of virtually identical facts, the Related Actions should be consolidated.

19 **B. The PSLRA's Lead Plaintiff Provisions**

20 The PSLRA establishes the procedure for the appointment of a lead plaintiff in "each
 21 private action arising under [the Exchange Act] that is brought as a plaintiff class action pursuant

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1 to the Federal Rules of Civil Procedure.” 15 U.S.C. §78u-4(a)(1). First, the plaintiff who files
 2 the initial action must publish a notice to the class within twenty days, informing class members
 3 of their right to file a motion for appointment as lead plaintiff. *See* 15 U.S.C. §78u-4(a)(3)(A)(i).
 4 Here, in connection with the filing of the first-filed action, notice was published on *Business*
 5 *Wire* on March 12, 2010. *See* Farris Decl., Ex. C. Within sixty days of the publication of notice,
 6 any person who is a member of the proposed class may apply to be appointed as lead plaintiff,
 7 whether or not they have previously filed a complaint in the action. *See* 15 U.S.C. §78u-
 8 4(a)(3)(A)(i)(II).

9 Second, the PSLRA provides that within ninety days after publication of notice, courts
 10 shall consider any motion made by a class member and shall appoint as lead plaintiff the member
 11 or members of the class that the court determines to be most capable of adequately representing
 12 the interests of class members. *See* 15 U.S.C. §78u-4(a)(3)(B)(i). In determining the “most
 13 adequate plaintiff,” the PSLRA provides that:

14 [T]he court shall adopt a presumption that the most adequate plaintiff in
 15 any private action arising under this [Act] is the person or group of
 16 persons that –

- 17 (aa) has either filed the complaint or made a motion in response to a
 18 notice...;
- 19 (bb) in the determination of the court, has the largest financial interest
 20 in the relief sought by the class; and
- 21 (cc) otherwise satisfies the requirements of Rule 23 of the Federal
 22 Rules of Civil Procedure.

23 15 U.S.C. § 78u-4(a)(3)(B)(iii) (emphasis added); *Cavanaugh*, 306 F.3d at 729-30.

24 The time period in which class members may move to be appointed lead plaintiff in this
 25 case expires on May 11, 2010. *See* 15 U.S.C. §78u-4(a)(3)(A)-(B). Pursuant to the PSLRA’s
 26 provisions, and within the requisite time frame after publication of the required notice, Mr.
 Moukarim has timely moved this Court to be appointed lead plaintiff on behalf of all members of
 the class. *See Dendreon*, 2007 U.S. Dist. LEXIS 76816, at *8-*9. In addition, Mr. Moukarim
 has selected and retained counsel experienced in the prosecution of securities class actions to

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1 represent him and the class. *See* Farris Decl., Exs. E-F. Accordingly, Mr. Moukarim satisfies
 2 the PSLRA's filing requirements and is entitled to have his application for appointment as lead
 3 plaintiff considered by the Court.

4 **C. Mr. Moukarim is the "Most Adequate Plaintiff"**

5 **1. Mr. Moukarim Has the Largest Financial
 6 Interest in the Relief Sought by the Class**

7 Mr. Moukarim lost approximately \$91,000 in connection with his purchases of Cell
 8 Therapeutics securities during the Class Period. To the best of his knowledge, this represents the
 9 largest known financial interest in the relief sought by the class. *See Cavanaugh*, 306 F.3d at
 10 730-32; *Dendreon*, 2007 U.S. Dist. LEXIS 76816, at *9.

11 **2. Mr. Moukarim Satisfies Rule 23**

12 In addition to possessing the largest financial interest, the lead plaintiff must also
 13 "otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15
 14 U.S.C. §78u-4(a)(3)(B)(iii)(I)(cc). While the PSLRA requires that a lead plaintiff meet the
 15 requirements of Rule 23(a), at this stage of the litigation, only a preliminary showing is required
 16 with respect to typicality and adequacy. *See Dendreon*, 2007 U.S. Dist. LEXIS 76816, at *10
 17 (citing *Cavanaugh*, 306 F.3d at 730 n.5). Consequently, in deciding motions for appointment of
 18 lead plaintiff, the Court should limit its inquiry to the typicality and adequacy prongs of Rule
 19 23(a), and defer examination of the remaining requirements until the lead plaintiff moves for
 20 class certification. *See id.*

21 **a. Mr. Moukarim is Typical**

22 Under Rule 23(a)(3), the claims or defenses of the representative party must be typical of
 23 those of the class. The test of typicality "is whether other members have the same or similar
 24 injury, whether the action is based on conduct which is not unique to the named plaintiffs, and
 25 whether other class members have been injured by the same course of conduct." *Hanon v.*

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1 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). However, the claims of the lead
 2 plaintiff need not be identical to the claims of the class to satisfy typicality. *Id.*

3 Here, Mr. Moukarim's claims are typical because, just like all other class members, he:
 4 (1) purchased or acquired Cell Therapeutics securities during the Class Period; (2) purchased
 5 Cell Therapeutics securities in reliance upon the alleged materially false and misleading
 6 statements issued by defendants; and (3) suffered damages thereby. *See id.* Thus, Mr.
 7 Moukarim's claims are typical of those of other class members because his claims and the claims
 8 of other class members arise out of the same course of events. *See* 7 Herbert Newberg & Alba
 9 Conte, Newberg on Class Actions §22.24, at 107-08 (4th ed. 2002) ("[t]he majority of class
 10 action decisions support the view that when it is alleged that the same unlawful conduct was
 11 directed at or affected both the named plaintiff and the class sought to be represented, the
 12 typicality requirement is met").

13 **b. Mr. Moukarim is Adequate**

14 Under Rule 23(a)(4), the representative party must "fairly and adequately protect the
 15 interests of the class." The adequacy requirement is met when "(1) the proposed lead plaintiff's
 16 interests are in common with, and not antagonistic to, those of the class; and (2) proposed lead
 17 plaintiff's counsel are qualified, experienced and generally able to conduct the litigation." *Dendreon*,
 18 2007 U.S. Dist. LEXIS 76816, at *11. Here, Mr. Moukarim is adequate because his
 19 interests are aligned with the interests of the class as both suffered from artificial inflation of the
 20 price of Cell Therapeutics securities and would benefit from the same relief. Additionally, there
 21 is no evidence of antagonism between Mr. Moukarim and the class, and he has certified his
 22 willingness to serve as a representative of the class. *See* Farris Decl., Ex. A.

23 Because Mr. Moukarim suffered substantial losses as a result of his Class Period
 24 purchases of Cell Therapeutics securities, he is committed to vigorously prosecuting this
 25 litigation and maximizing the recovery for the class. *See* Farris Decl., Ex. B. Moreover, as
 26 shown below, Mr. Moukarim has retained highly qualified, experienced counsel that are able to

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1 conduct this complex litigation in a professional manner. Thus, for the purposes of this Motion,
 2 Mr. Moukarim satisfies the typicality and adequacy requirements of Rule 23.

3 **IV. THE COURT SHOULD APPROVE MR. MOUKARIM'S CHOICE OF COUNSEL**

4 The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject
 5 to the Court's approval. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v). The Court should not disturb lead
 6 plaintiff's choice of counsel unless it is necessary to "protect the interests of the class." 15 U.S.C.
 7 §78u-4(a)(3)(B)(iii)(II)(aa); *see also Cavanaugh*, 306 F.3d at 734. Mr. Moukarim has selected
 8 Barroway Topaz as lead counsel and Keller Rohrback as liaison counsel for the class. Both
 9 firms are actively engaged in complex litigation and have successfully prosecuted numerous
 10 securities fraud class actions on behalf of injured investors. *See* Farris Decl., Exs. E-F. Thus,
 11 the Court may be assured that in the event this Motion is granted, the members of the class will
 12 receive the highest caliber of legal representation available from Barroway Topaz and Keller
 13 Rohrback. Accordingly, the Court should approve Mr. Moukarim's selection of lead counsel and
 14 liaison counsel.

15 **V. CONCLUSION**

16 For the foregoing reasons, Mr. Moukarim respectfully requests that the Court: (1)
 17 consolidate the Related Actions pursuant to Fed. R. Civ. P. 42(a); (2) appoint Mr. Moukarim as
 18 lead plaintiff; and (3) approve his selection of Barroway Topaz as lead counsel and Keller
 19 Rohrback as liaison counsel.

20
 21 Dated: May 11, 2010

Respectfully submitted,

22
 23 KELLER ROHRBACK L.L.P.

24 By: /s/ Juli E. Farris

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of filing to the CM/ECF participants listed below:

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1 I further certify that I have mailed, by United States Postal Service, the foregoing
2 document to the non-CM/ECF participants listed below:

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